Supreme Court, U.S.
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No. 85-1165

In The

Supreme Court of the United States

October Term, 1985

NANTAHALA POWER AND LIGHT COMPANY,
TAPOCO, INC., AND
ALUMINUM COMPANY OF AMERICA,

Appellants.

v.

STATE OF NORTH CAROLINA ex rel.
UTILITIES COMMISSION: LACY H. THORNBURG,
Attorney General, et al.,

Appellees.

On Appeal from the Supreme Court of North Carolina

APPELLEES' MOTION TO DISMISS APPEAL AND MOTION TO AFFIRM JUDGMENT OF THE NORTH CAROLINA SUPREME COURT

CRISP, DAVIS, SCHWENTKER, PAGE & CURRIN

William T. Crisp*
Robert F. Page
320 South Salisbury Street
Post Office Box 751
Raleigh, North Carolina 27602
(919) 833-2556

Attorneys for: Henry J. Truett; Counties of Cherokee, Graham, Swain, Jackson; Towns of Andrews, Dillsboro, Robbinsville, Bryson City, Sylva; and the Tribal Council of the Eastern Band of the Cherokee Indians

LACY H. THORNBURG
ATTORNEY GENERAL
OF NORTH CAROLINA

Richard L. Griffin
Assistant Attorney General
N.C. Department of Justice
Suite 207,
Hayes and Hopson Bldg.
20 South Spruce Street
Asheville, North Carolina 28801
(704) 258-6083
Attorneys for: the Using and Consuming Public

THE PUBLIC STAFF
NORTH CAROLINA
UTILITIES COMMISSION
Robert Gruber, Exec. Director
James D. Little, Staff Attorney
Post Office Box 29520
Raleigh, North Carolina
27626-0520
Attorney for: the Using and Consuming Public

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

DOES THE ORDER OF THE NORTH CAROLINA UTILITIES COMMISSION, AS AFFIRMED BY THE NORTH CAROLINA COURT OF APPEALS AND THE NORTH CAROLINA SUPREME COURT, PRESENT A SUBSTANTIAL FEDERAL QUESTION?

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STATEMENT OF THE CASE

Appellees agree with Appellants that this case is identical in all material respects to Nantahala I, presently before this Court as Docket No. 85-568. This, too, is a retail rate case wherein the North Carolina Utilities Commission (NCUC) found as facts that:

(1) Tapoco is a North Carolina public utility (Appendix to Jurisdictional Statement or "App.", p. 34a).

(2) Alcoa, as the 100% parent of Nantahala, is, pursuant to G.S. 62-3(23)(2), a North Carolina public utility to the extent of its effect on Nantahala's retail rates and services (App., p. 34a).

(3) Tapoco and Nantahala operate a single unified electric public utility system (App., p. 34a).

(4) Alcoa is the dominant parent of Nantahala to the detriment of Nantahala and its ratepayers[1] (App., pp. 37a, 59a).

Based upon these findings, the NCUC rolled-in the rate base and financial data of Tapoco with that of Nantahala, allocated costs as between Nantahala's retail public load and the remaining loads of the Nantahala-Tapoco single system, using generally accepted cost allocation techniques, and set Nantahala's retail rates accordingly. All system costs were treated and allocated. Federal Energy Regulatory Commission (FERC) approved agree-

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1. None of these four findings involves a federal question. Each finding has been upheld by the North Carolina Appellate Courts. The parties to this proceeding are bound by those findings and cannot repudiate them. *Herb v. Pitcairn,* 324 U.S. 117 (1954).

ments between Nantahala and Tapoco, and between them and other parties, were not reformed either directly or indirectly. The roll-in did not allocate electric power or intrude upon the actual allocations of electric power between Tennessee and North Carolina.

The only critical difference between this case and Nantahala I is the 1979 test year[2] used for identifying financial data, with the resultant variation in financial data, the ultimate rates established, and the amount of refund.[3] As a result of the roll-in, Nantahala was, once again, ordered to reduce its proposed, then in effect, rates, and to refund its overcharges to retail customers. Alcoa, as the parent of Nantahala, was, again, ordered to pay that portion of the refund that Nantahala was unable to pay (App., p. 37a).

The issues raised by Appellants, of federal preemption (the filed rates doctrine) and impermissible burden upon interstate commerce, do not revolve so much around the roll-in, which is clearly a cost allocation technique rather than a power allocation technique, but rather around the action taken by FERC in related cases. Thus, a statement must be made about those cases.

The New Fontana Agreement (NFA) was filed (under protest) in 1966, and was accepted as a FERC jurisdictional rate schedule. However, the NFA was a power exchange agreement between Tennessee Valley Authority (TVA)

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2. Nantahala I, Case No. 85-568, used a 1975 test year.

3. The ultimate refund for the two year period after the NCUC order, which was never put into effect, until Nantahala's subsequent (third) rate case superceded those rates, was about $5,000,000 annually. Currently, with accrued interest, the two year refund totals about $15 million.

on the one hand, and Alcoa, Tapoco and Nantahala on the other. While Nantahala was a signatory party to the agreement, it was not present at any negotiation (App., p. 97a). Under the NFA, Tapoco turned over all, and Nantahala most, of its generation to TVA, with the Alcoa Companies receiving back power that was designed for Alcoa's aluminum manufacturing load rather than for Nantahala's public load. Division of the TVA return power was left up to the companies.

In the FERC Docket ER 81-19-000, Tapoco, over protest, filed the 1971 Apportionment Agreement (1971 Agreement), for approval, arguing that it was not a jurisdictional rate schedule subject to FERC jurisdiction. The FERC accepted it as jurisdictional, but held that the reasonableness of the agreement was subject to the outcome of pending proceedings in Dockets EL 78-18 and ER 76-828. The 1971 Agreement allocated the NFA power returned by TVA, but did not, in any manner, allocate costs. It was exclusively a power allocation agreement.

FERC Docket ER 76-828 was a previously filed Nantahala wholesale rate case, affecting three wholesale customers who accounted for 7% of Nantahala's load, to increase wholesale rates by annual charges of $121,908. Consolidated for hearing with it was Docket EL 78-18, a complaint action by the Town of Highlands, which alleged that Nantahala's wholesale rates were too high because of Alcoa's improper activities. These two Dockets were consolidated and heard prior to the filing of the 1971 Agreement, although orders were issued after that filing.

In those two cases, roll-in relief, as sought in the Highlands' complaint action, was denied; however, the FERC

expressly found that the 1971 Agreement was unfair and unreasonable. Thereupon, the FERC, without reforming the 1971 Agreement, theoretically attributed to Nantahala an additional 44,000,000 k.w.h. of annual energy generation for the purpose of setting Nantahala's wholesale rates. A refund to the three wholesale customers of approximately $1.9 million resulted. In the appellate review of these two Dockets, in *Nantahala Power and Light Co. v. FERC*, 727 F.2d 1342, 1346 (4th Cir., 1984) the Court of Appeals stated:

> . . . Since Nantahala only received 360 million killowatt hours under the 1971 Agreement, the Commission reasoned that Nantahala had purchased from TVA 44 million kilowatt hours of energy more than it should have, and these excessive purchases should not have been reflected in Nantahala's rates.

In considering the preemption (filed rates) issue, it is of critical importance to compare and contrast what the NCUC did and did not do with what FERC did and did not do.

STATEMENT OF FACTS

> The unique facts which led the NCUC to conclude . . .
>
> that Alcoa has dominated these transactions and agreements affecting its wholly owned subsidiary Nantahala to the extent that Nantahala has been left unable to act in its own self interest, let alone in the interests of its public utility customers in North Caroline. . . . (App., p. 97a).

and to apply a roll-in methodology for the Nantahala/Tapoco single electric public utility system, in setting Nantahala's North Carolina retail rates, are identical to

those of Nantahala I (Case No. 85-568) as contained in "Appellee's Motion To Dismiss Appeal And Motion To Affirm Judgment Of The North Carolina Supreme Court" (Motion, pp. 4-11) filed in that case. For the convenience of the Court, those facts will not be repeated here.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, Appellees move to dismiss the Appeals of Alcoa, Tapoco and Nantahala for the reason that they present no substantial federal questions. In addition, Appellees move to affirm the Judgment and Opinion of the North Carolina Supreme Court on the ground that such opinion, based upon the facts determined below, was correctly decided. Finally, Appellees contend that the Appeal should not be favorably treated, alternatively, as a Petition for Writ of Certiorari and that a Writ of Certiorari should not issue.

ARGUMENT

I. The Order Of The North Carolina Utilities Commission, As Affirmed By The North Carolina Court Of Appeals And The North Carolina Supreme Court, Does Not Present A Substantial Federal Question.

The appellants have now unsuccessfully argued their federal questions six times — twice before the NCUC, twice before the North Carolina Court of Appeals and twice before the North Carolina Supreme Court. They raised the same questions and made the same arguments in this case as in Nantahala I (Case No. 85-568, presently before this Court). As hereafter stated, Appellees contend that the orders appealed from rest on adequate nonfederal basis and that any feedrai questions raised are not substantial, in view of the unique facts of this case. Nevertheless, Appellees do agree with Appellants' contention

that since this Court has accepted jurisdiction of Nantahala I, the Court should not be needlessly burdened with additional arguments as to why it should or should not accept jurisdiction in this case and consolidate it with Nantahala I or hold it for decision pending the outcome of Nantahala I.

With one possible exception, there is no readily apparent value to the Court in having this case briefed and argued. That single exception is that, in the NCUC order here appealed from, there is no statement by the NCUC, as in Nantahala I, that the North Carolina public load had a "first call" on the energy output of the combined Nantahala-Tapoco system. That erroneous phraseology was deleted and effectively disavowed (App., 41a).

Subject to that single exception, Appellees concur with Appellants that noting jurisdiction in this case and consolidating it for argument with Nantahala I would require neither additional briefing nor additional time for argument.

Appellees point out to the Court that it is of utmost importance that the current case be fully and completely controlled by this Court's decision in Nantahala I. For the sake of expediency and economy, Appellees recommend that the Court retain this case on its docket pending the final decision of Case No. 85-568, with orders that this case be controlled by that decision.

Despite Appellees' agreement that this case essentially matches Nanatahala I, in order to fully protect their client's interests and to fully comply with the Court's Rules, Appellees briefly set forth their arguments as to why this Court should not note probable jurisdiction and should dismiss the appeal.

A. The Roll-In Is Not Barred By Part II Of The Federal Power Act.

The NCUC based the roll-in methodology upon four essential findings of fact:

1. Tapoco is a North Carolina public utility.
2. Alcoa, as the 100% parent of Nantahala, is pursuant to G.S. 62-3(23)(2), a North Carolina public utility to the extent of its effect on Nantahala's retail rates and services.
3. Tapoco and Nantahala operate a single unified electric public utility system.
4. Alcoa is the dominant parent of Nantahala to the detriment of Nantahala and its ratepayers.

None of these findings involve a federal question. Each finding has been upheld by the North Carolina Appellate Courts. The parties hereto are bound by such state findings and cannot repudiate them *(Herb v. Pitcairn*, 324 U.S. 117 (1954)). As a result of these findings, the roll-in methodology rests upon adequate non-federal grounds and is not within the prohibitions of the federal preemption (filed rates) doctrine and does not constitute an improper intrusion upon interstate commerce.

The roll-in ratemaking methodology was used to ensure just and reasonable rates for Nantahala retail ratepayers under the unique circumstances of extreme corporate abuse of Nantahala by its parent, Alcoa, based upon a 40-year history of corporate manipulations, as well as upon unfair and unreasonable agreements between Nantahala and Tapoco, entered into at the instance of Alcoa.

When the FERC set Nantahala's wholesale rates, it, too, found that the agreements between Nantahala and Tapoco were unfair and unreasonable as to Nantahala, and it set Nantahala's rates upon the theoretical assumption that Nantahala received more electric power than was apportioned to it under the 1971 Agreement. By this theoretical attribution of additional power to Nantahala, the FERC, itself, in order to assure just and reasonable rates to Nantahala's wholesale customers, although declining to use a roll-in methodology, ignored the power allocated to Nantahala by the 1971 Agreement (the filed rate).

Moreover, the 1971 Agreement allocated, as between Nantahala and Tapoco, only the TVA power returned to the Alcoa system. This FERC-accepted Agreement did not, in any manner, allocate costs, much less single system costs. On the other hand, the roll-in accepted this Agreement's power allocations, and did not award to Nantahala any additional power. Not an iota of that Agreement was modified or reformed by the NCUC. Instead, the roll-in methodology allocated costs and costs only. Additionally, every single cost of the single system was placed in the pot and Nantahala's retail load was attributed a proper portion of those single system costs.

Accordingly, the roll-in is based on non-federal grounds for three reasons. First, the FERC, itself, in Docket Nos. ER 76-828 and EL 78-18, set wholesale rates without reformation of the 1971 Agreement, even though it had accepted jurisdiction of the 1971 Agreement in Docket ER 81-19-000. Under the filed rates doctrine, the FERC, in setting rates under Section 205 of the Federal Power

Act, is as bound by agreements accepted for filing as is a state's utility commission in setting a utility's retail rates (*Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981)). Since the FERC chose to ignore the power allocations in the 1971 Agreement for setting Nantahala's wholesale rates, it is clear that the filed rates doctrine is not applicable to the cost allocation techniques employed by the FERC. Indeed, just as did the NCUC, the FERC found the 1971 Apportionment Agreement to be unfair and unreasonable for purposes of setting Nantahala's wholesale rates. If the filed rate doctrine did not block the FERC's action, it cannot be held to block the NCUC's action.

Second, the 1971 Agreement apportioned *power* as between Nantahala and Tapoco. It did not apportion *costs*, much less costs of a single system. The NFA is totally silent with respect to both allocations of power and costs. The most that the NFA does is denominate Alcoa (or the Alcoa Companies) as recipient of the TVA return power, with that power to be divided by Alcoa, Tapoco and Nantahala as they deem appropriate. From 1962 to 1971, Nantahala had received its share of the power by separate agreement with Alcoa.

Third, it is clear that federal and state regulatory commissions can adopt different ratemaking methodologies (*Mid-Tex Electric Cooperative, Inc. v. FERC*, 733 F.2d 327 (D.C. Cir., 1985)). The NCUC is no more bound to use the FERC's ratemaking techniques than is the FERC bound to use the NCUC's techniques. In its opinions 139 and 139A, FERC recognized that it was not bound by the NCUC's use of the roll-in or the NCUC's findings that Nantahala/Tapoco constitute a single sys-

tem or that Tapoco was a North Carolina public utility. The converse of that proposition is also true — the NCUC is not bound by the FERC's decision not to apply a roll-in, find a single system, and so forth.

The *Narragansett* line of cases[4] is inapplicable to the current case for the reason that, in each of these cases, a State Commisison attempted to avoid passing on to retail ratepayers a FERC-approved cost. In the current case, all costs were divided up; none were excluded, with the result that the current case is outside of the Narragansett line of cases. In addition, none of the *Narragansett* line of cases involve the unique facts, especially the parental domination by Alcoa, of this case.

Furthermore, a developing line of cases[5], epitomized by *Public Service Co. of Colorado v. Public Utilities Comm. of Colorado*, 644 P.2d 933 (Colo. 1982), recognizes that the filed rates doctrine does not preclude a state utility commission from determining whether certain FERC-

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4. *Narragansett Electric Co. v. Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32 (N.D. 1981); *Northern States Power Co. v. Minnesota Public Utilities Commission*, 344 N.W.2d 374 (Minn. 1983), *cert. denied*, 104 S.Ct. 3546 (1984); *United Gas Corp. v. Mississippi Public Service Commission*, 240 Miss. 405, 127 So.2d 404 (1961); *City of Chicago v. Illinois Commerce Commission*, 13 Ill.2d 607, 150 N.E.2d 776 (1958); *Citizens Gas Users Assn. v. Public Utilities Commission of Ohio*, 165 Ohio 536, 138 N.E.2d 383 (1956); *Office of Public Counseilor v. Indiana & Michigan Electric Co.*, 416 N.E.2d 161 (Ind. App. 1981).

5. *Washington Gas Light Co. v. Public Service Commission of the District of Columbia*, 452 A.2d 3[illegible] (D.C. 1982), *cert. denied*, 462 U.S. 1107 (1983); *Appeal of Sinclair Machine Products, Inc. et al*, 498 A.2d 696 (1985); *Pike County Light and Power Co. v. Pennsylvania Public Utility Commission*, 77 Pa. Commw. Ct. 268, 165 A.2d 735 (1983).

approved costs should properly be borne by the ratepayers or by the stockholders. If the *Narragansett* line of cases extends to costs which have not been FERC-approved, which Appellees deny, nevertheless, in the current case, it was proper for the NCUC to shift unfair and unreasonable costs to Alcoa as the owner of Nantahala. The roll-in certainly did not shift any costs to Alcoa in its status as a customer of Tapoco or in its status as a Tennessee customer.

B. The Roll-In Is Not Barred By The Commerce Clause.

Since the roll-in neither diverted, directly or indirectly, any power from Tapoco/Alcoa to Nantahala nor created a preference for North Carolina ratepayers (App., p. 41a), there was no intrusion upon interstate commerce so as to constitute a violation of the Commerce Clause of the United States Constitution. The preference prohibition of *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (NEPCO) is not applicable. In no manner can it be found that the roll-in was implemented for the sole or primary purpose of granting an unfair preference for North Carolina. Instead, its sole purpose was to set fair and reasonable retail electric rates for an Alcoa subsidiary which was utterly dominated by Alcoa for Alcoa's benefit and to the ratepayers' significant detriment.

Any economic benefit favoring North Carolina ratepayers flowed from an evenhanded effectuation of legitimate local public interests and placed, if any, only an incidental burden on interstate commerce. Thus, such economic benefit is permissible under the test of this Court as laid down in *Pike v. Bruce Church*, 397 U.S. 137 (1970).

CONCLUSION

The Court, consistent with its decision to note probable jurisdiction of Nantahala I, should retain this case on its docket to be controlled by the decision in Nantahala I (Case No. 85-568). Alternatively, and consistent with their position that this case rests on adequate non-federal grounds and involves no substantial federal question, Appellees urge ultimate dismissal of this appeal and affirmance of the order of the NCUC and the decision of the North Carolina Supreme Court.

Respectfully submitted this 7th day of February, 1986.

CRISP, DAVIS, SCHWENTKER, PAGE & CURRIN

William T. Crisp*
Robert F. Page
320 South Salisbury Street
Post Office Box 751
Raleigh, North Carolina 27602
(919) 833-2556

Attorneys for: Henry J. Truett; Counties of Cherokee, Graham, Swain, Jackson; Towns of Andrews, Dillsboro, Robbinsville, Bryson City, Sylva; and the Tribal Council of the Eastern Band of the Cherokee Indians

LACY H. THORNBURG
ATTORNEY GENERAL
OF NORTH CAROLINA

Richard L. Griffin
Assistant Attorney General
N.C. Department of Justice
Suite 207,
Hayes and Hopson Bldg.
20 South Spruce Street
Asheville, North Carolina 28801
(704) 258-6083

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THE PUBLIC STAFF
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UTILITIES COMMISSION
Robert Gruber, Exec. Director
James D. Little, Staff Attorney
Post Office Box 29520
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*Counsel of Record